

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: June 8, 2018

CLAIM NO. 201701236

KROGER

PETITIONER/CROSS-RESPONDENT

VS.

**APPEAL FROM HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE**

CHERYL CATES
and HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/CROSS-PETITIONER

RESPONDENT

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Kroger appeals and Cheryl Cates ("Cates") cross-appeals from the February 9, 2018, Opinion, Award, and Order of Hon. Jeff V. Layson, Administrative Law Judge ("ALJ"). Pursuant to the parties' stipulations, the ALJ found Cates sustained a work-related left shoulder injury on August 15, 2015. The ALJ then found Cates had a 2% pre-existing active impairment prior to the August 15, 2015,

left shoulder injury. The ALJ found Cates has a 16% impairment rating attributable to the August 15, 2015, injury. The ALJ enhanced Cates' award of permanent partial disability ("PPD") benefits by the three multiplier set forth in KRS 342.730(1)(c)1. Because Cates was 66 years old at the time of the injury, the ALJ did not apply the tier-down provision of the 1994 version of KRS 342.730(4). Cates was awarded 425 weeks of PPD benefits from and after August 15, 2015. She was not awarded temporary total disability benefits.

Kroger filed a petition for reconsideration asserting the tier-down provision should apply and the three multiplier was not applicable. By Order dated March 9, 2018, the ALJ overruled Kroger's petition for reconsideration.

On appeal, for the first time Kroger asserts that pursuant to KRS 342.730(4) amended on March 30, 2018, the PPD benefits should terminate on August 15, 2019. It notes that this year the Kentucky General Assembly amended KRS 342.730(4) to the extent it terminates all income benefits when the employee reaches 70 or four years after the employee's date of injury or date of last exposure,

whichever occurs last.¹ Further, it notes the General Assembly mandated the newly enacted version of KRS 342.730(4):

[s]hall apply prospectively and retroactively to all claims: (a) for which the date of injury or last exposure occurred on or after December 12, 1996; and (b) that have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of the act.

Thus, it contends the clear and unambiguous language contained in the new version of KRS 342.730(4) should be retroactively applied in this claim since it has not been fully and finally adjudicated and is in the appellate process. Kroger seeks reversal of the award of income benefits and remand for application of the provisions in the newly enacted KRS 342.730(4).

Cates responds that the Kroger appeal does not provide a proper basis for the Board to reverse the ALJ pursuant to KRS 342.285 since it will not become effective until mid-July. Therefore, the newly enacted version of KRS 342.730(4) does not apply to her claim.

On cross-appeal, Cates argues the retroactivity provision contained in the newly enacted version of KRS

¹ This legislation is commonly referred to as House Bill 2 ("HB 2").

342.730(4) is unconstitutional. We affirm on appeal and cross-appeal.

Simply stated, we find no merit in Kroger's argument that Cates' award is subject to the limits contained in the newly enacted version of KRS 342.730(4) as set forth in HB 2 which has yet to take effect. Because this law was not in effect at the time of the injury and the ALJ's award, and will not be in effect at the time of rendition of this opinion, we decline to entertain this argument.

Similarly, we decline to address Cates' cross-appeal as the version of KRS 342.730(4) amended on March 30, 2018, by the Kentucky General Assembly has yet to take effect. Moreover, this Board has no authority to rule on questions of the constitutionality of statutes or administrative regulations. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945).

Accordingly, the February 9, 2018, Opinion, Award, and Order and the March 9, 2018, Order overruling Kroger's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER/
CROSS-RESPONDENT:**

HON SHARLOTT K HIGDON
P O BOX 995
PADUCAH KY 42002-0995

**COUNSEL FOR RESPONDENT/
CROSS-PETITIONER:**

HON JEFFERY A ROBERTS
509 MAIN ST
MURRAY KY 42071

ADMINISTRATIVE LAW JUDGE:

HON JEFF V LAYSON
657 CHAMBERLIN AVE
FRANKFORT KY 40601